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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
Petitioner,

v.

IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Did the Kansas Supreme Court's failure on remand from *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), to honor this Court's conclusion that conflicts of laws existed between Kansas law and the law of more interested states violate this Court's mandate?

2. Did the Kansas Supreme Court err in creating federal common law to control the relationship between gas producers or purchasers and royalty owners when the applicable federal statutes and regulations show absolutely no basis for doing so?

3. Did the Kansas Supreme Court's failure to exercise good faith in determining and applying the laws of interested states to transactions governed by those states' laws violate the mandate of this Court and Phillips Petroleum Company's rights secured by the Due Process and Full Faith and Credit Clauses?

4. Did the Kansas Supreme Court's utilization of a federal regulation in a manner never intended by Congress or the regulatory agency that promulgated it, producing an adverse impact on interstate natural gas pricing, violate the Supremacy Clause of Article VI of the United States Constitution?

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IRL SHUTTS and ROBERT ANDERSON and BETTY ANDERSON, individually and as representatives of all producers and royalty owners to whom Phillips Petroleum Company made payment of suspended proceeds of royalties pursuant to Federal Power Commission Opinion Nos. 699, 699H, 749, 749C, 770 and 770A,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND PETITION FOR WRIT OF MANDAMUS

Petitioner Phillips Petroleum Company (Phillips)[1] prays that a writ of mandamus issue on questions one and three directing the Supreme Court of Kansas to comply with the mandate of this Court issued following the decision of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). In the alternative, Phillips requests this Court to consider all questions as a petition for certiorari to review the opinion and judgment of the Supreme Court of Kansas entered in *Shutts v. Phillips Petroleum Co.*, 240 Kan. 764, 732 P.2d 1286 (1987).

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[1] Petitioner's statement pursuant to Supreme Court Rule 28.1 is set forth in the Appendix at page 175a.

OPINIONS BELOW

The opinion of the Supreme Court of Kansas (240 Kan. 764, 732 P.2d 1286) is set forth in the Appendix at page 1a. The opinion of the district court on remand is set forth in the Appendix at page 54a. The opinion of this Court (472 U.S. 797) is set forth in the Appendix at page 60a. The first opinion of the Kansas Supreme Court (235 Kan. 195, 679 P.2d 1159) is set forth at page 111a, and the first opinion of the district court is set forth at page 155a.

JURISDICTION

The Supreme Court of Kansas entered its opinion February 25, 1987. Phillips' motion for rehearing was denied by that court on May 11, 1987. App. 53a. Phillips applied for an extension of time to file this petition, and Justice White, on July 31, 1987, granted petitioner until August 28, 1987, in which to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1651 and § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, § 1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state.

Article VI of the United States Constitution provides in pertinent part:

> This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

Petitioner Phillips, a Delaware corporation with its principal place of business in Oklahoma, produced or purchased natural gas from numerous oil and gas leases covering lands located in 12 states. Phillips paid producers and made its royalty payments on the basis of a percentage of the monies received by Phillips when it sold some of this (and other) gas to pipeline companies for transportation and resale in interstate commerce at prices regulated by the Federal Power Commission (the Commission).[2]

Phillips was required to obtain Commission approval of price increases for gas sales, but was permitted to collect the higher prices pending final approval after undertaking to refund to the purchasing pipeline companies any part of the price increases not approved by the Commission. While Commission approval of price increases was pending, Phillips made royalty payments based on rates previously approved by the Commission. Phillips paid *additional* royalties to royalty owners by making calculations based on the finally approved prices after resolution of court challenges to Commission Opinions Nos. 699, 749 and 770.

In this Kansas state court class action, three named royalty owners, for themselves and on behalf of a class of over 28,000 royalty owners, seek to recover *interest* on the additional royalties Phillips paid.[3] One of the

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[2] The responsibilities of the Federal Power Commission (FPC) were transferred to the Federal Energy Regulatory Commission (FERC) in 1977. See 91 Stat. 578, 582-84. Phillips will refer to both the FPC and the FERC as the Commission.

[3] The issue here was not one of additional royalties that were *never* paid, or royalties that were *untimely* paid; the action concerns only whether interest should have been paid on the additional royalties.

named class representatives, Irl Shutts, is a resident of Kansas; the other two are residents of Oklahoma. They represent a class composed of residents of every state.

On March 24, 1984, the Kansas Supreme Court affirmed a decision of the District Court of Seward County, Kansas that held Phillips liable under Kansas law to all class members having no contact with the forum and required payments to all class members of interest at rates established in federal regulations by the Commission for refunds to pipeline purchasers. App. 148a-149a. The court held that the interest liability was based on Kansas equitable principles. Phillips petitioned this Court for a writ of certiorari.

On October 9, 1984, this Court granted certiorari in *Phillips Petroleum Co. v. Shutts*, 469 U.S. 879, to address two questions: (1) Whether a state court in a class action could exercise jurisdiction over unnamed nonresident class members with no contacts with the forum state to adjudicate claims unrelated to that state; and (2) whether a state court in a nationwide class action consistent with the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the United States Constitution could apply its own laws controlling liability for interest and interest rates to transactions between nonresidents that occur in other states and to which the forum has no connection.

This Court determined that a state court could exercise jurisdiction over unnamed nonresident plaintiff class members if certain procedural protections were provided, but this Court reversed the Kansas Supreme Court's application of Kansas law to all transactions involved in this case. Finding that Kansas constitutionally could not apply its own laws to each transaction, this Court reversed the judgment of the Kansas Supreme Court and remanded the suit to that court "for further proceedings not inconsistent with this opinion." App. 84a.

The Kansas Supreme Court, in turn, remanded the case to the Seward County District Court for proceedings not inconsistent with this Court's opinion. The district court issued a decision that "affirmed" the judgment that this Court had reversed. App. 59a. That decision again was appealed to the Kansas Supreme Court. In reviewing the district court decision, the Kansas Supreme Court purported to examine the law of the five other states having direct connections with most of the transactions involved in this lawsuit. That court evaded the mandate of this Court by ignoring the conflicts previously recognized by this Court and by misconstruing the laws of the other interested states. It extended a wholly inapposite federal regulation by applying it to the relationship between a royalty owner and a producer or purchaser and did so at the expense of interested states' law. The effect of these actions was to create federal common law, identical to Kansas law, which the Kansas court applied as the law of each of the interested states.

In holding Phillips liable for interest, the Kansas Supreme Court utilized the interest rates established by a federal regulation, 18 C.F.R. § 154.102, which prescribes interest liability and the rates imposed upon a seller of gas when that seller must refund interim rates to a pipeline purchaser that are held to be unjustified.[4] The Kansas Supreme Court created federal common law by extending this regulation to apply to amounts paid to royalty owners as additional royalties after Commission approval of higher gas prices. That court held Phillips liable to royalty owners for interest at the rates specified in the regulation.

A writ of mandamus should issue to direct the Kansas Supreme Court to execute this Court's prior mandate. In the alternative, this Court should grant certiorari to

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[4] The text of 18 C.F.R. § 154.102 appears in the Appendix at page 165a.

invalidate the Kansas Supreme Court's misguided creation of federal common law and to determine that Phillips' constitutional rights have been violated once again.

REASONS FOR GRANTING THE WRIT

I. The Actions Of The Kansas Supreme Court Were Directly Inconsistent With This Court's Mandate.

In *Phillips Petroleum Co. v. Shutts, supra,* this Court recognized that, as a prerequisite to reaching the constitutional issue created by the application of Kansas law to all transactions in this case, it first had to determine if the chosen Kansas law conflicted in any material way with any other law that could apply. This Court recognized that there could be no injury in the application of Kansas law if it did not conflict with the law of any other jurisdiction connected to this suit. App. 79a. This Court addressed the laws of the other interested states and found that Kansas law varied in significant ways from the laws of Oklahoma, Texas and Louisiana. This Court specifically discussed the different interest rates that were applicable under Kansas, Texas and Oklahoma law and also cited an Oklahoma statute that, unlike Kansas law, excuses liability for interest if a creditor accepts payment of the full principal. After reviewing these differences, and others, this Court stated that:

> Given Kansas' lack of "interest" in claims unrelated to that State, *and the substantive conflict with jurisdictions such as Texas,* we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

App. 84a-85a (emphasis added).[5]

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[5] Justice Stevens was the lone dissenter from this Court's determination that the application of Kansas law resulted in the deprivation of Phillips' constitutional rights, concluding that the

This Court specifically discussed an earlier, but similar, lawsuit between some of the same parties, *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978). In discussing that case, and the conflicts between the interest rates applied by the Kansas court and those applied by the Texas courts, this Court stated that "in finding the 6% Texas rate inapplicable, [the Kansas Supreme Court] *cited but did not follow contrary Texas precedent.*" App. 85a, n.8 (emphasis added).

On remand, the Kansas Supreme Court found that no Texas court ever had mentioned the higher rates set by federal regulations and noted that Texas statutes provide for an interest rate of no more than six or ten percent. App. 19a. Inexplicably, however, the Kansas Supreme Court applied the higher federal rates to determine the prejudgment interest arising on the Texas obligations. This holding directly conflicted with this Court's decision. Once again the Kansas Supreme Court cited but did not follow contrary Texas precedent.

The Kansas Supreme Court had a duty to act consistently with this Court's determination that conflicts of laws existed. It was required to give effect to those conflicts recognized by this Court and to apply the law of the other states. The Kansas Supreme Court did not do that. Instead, that court circumvented this Court's mandate by distorting the law of each of the interested states and reaching a preordained conclusion, contrary to this Court's decision, that those states' laws were identical to that of Kansas. The state court overstepped its constitutional authority in revising and evading what this Court had determined.

Court should have found no constitutionally significant conflict. This dissent dispels all doubt that the majority's holding that the conflict between the other states' laws and the Kansas law was central to this Court's determination that a constitutional violation had occurred.

Mandamus is available to a party who has prevailed in this Court if a lower court "does not proceed to execute the mandate, or disobeys and mistakes its meaning . . . ." *United States v. Fossatt*, 62 U.S. (21 How.) 445, 446 (1859). This Court in *Phillips Petroleum Co. v. Shutts* determined that conflicts existed between Kansas and other states' laws. That determination, a *necessary prerequisite* for the constitutional question resolved by this Court in its previous review of this class action, must be "considered as finally settled." *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Failure to give effect to this Court's opinion justifies issuance of a writ of mandamus. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424 (1978).

The Kansas court's disobedience to this Court's mandate contributes

> discredit to the country's judicial system. The layman expects that an adjudication of a party's rights by the United States Supreme Court is determinative; and loss of respect follows naturally if its mandates are evaded or if litigation is again prolonged.

Note, *State Court Evasion of United States Supreme Court Mandates*, 56 Yale L.J. 574, 580 (1947). A writ of mandamus should issue to the Kansas Supreme Court.

II. Creating Federal Common Law To Hold Phillips Liable For Prejudgment Interest At The "FERC Rates" Was An Inappropriate Exercise Of Judicial Power And Was Contrary To Federal Law.

The court below determined that the outcome under the laws of five independent states would be identical to results reached under Kansas law. It did so by treating issues as if they were governed by a wholly inapposite federal regulation, 18 C.F.R. § 154.102. The Kansas court held that this regulation: (1) invalidated contract clauses, App. 14a-16a, 26a; (2) constituted the basis for

an agreement that set interest rates, App. 27a; (3) gave rise to a third-party beneficiary relationship in the royalty owners' favor, App. 37a; and (4) would be looked to by all the states involved in this action as the final word on the applicable rate of interest, App. 50a. In the Kansas Supreme Court's view, the additional royalties "originated in federal law and are thoroughly permeated with interest fixed by federal law in the [Commission] regulations . . . ." *Id.*

Through its repeated use of this federal regulation to overcome obstacles posed by otherwise applicable state law that differed from Kansas law, Kansas created a far-reaching penumbra of new federal common law surrounding this regulation. This new common law of interest liability never was intended by Congress or the Commission and is not consistent with the regulation relied on or the underlying statute. Kansas' creation of this law not only invades the domain reserved to Congress by the Commerce Clause to deal with matters such as these, if it chooses to do so, but it intrudes on the freedom of other, more interested, states to apply their own substantive law to a wide range of oil and gas transactions. Certiorari should be granted so that this Court, which is the only forum available, can correct the errors stemming from the Kansas Supreme Court's adventure into establishing a federal common law governing the relationship between gas producers and royalty owners regarding interest.

The interest rates established by 18 C.F.R. § 154.102 (the FERC rates) relied upon by the Kansas court have a single, limited purpose. They explicitly apply only to interest paid by sellers to pipelines on rates that are collected subject to refund and are later determined to be unlawful under Section 4(a) of the Natural Gas Act, 15 U.S.C. § 717c(a) (NGA). The FERC rates, which presently are tied to prime interest rates, are imposed pursuant to the NGA, which requires that amounts collected

from a pipeline pending approval be refunded "with interest" if found to be "not justified." 15 U.S.C. § 717c (e).[6]

The Kansas court's extension of the federal regulation promulgated under authority of the NGA to transactions with royalty owners is not consistent with the Act. This Court has indicated that the NGA was intended to provide "[p]rotection of consumers against exploitation at the hands of natural-gas companies," *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 685 (1954), while "in no way interfering with state regulatory power over the physical production or gathering in furtherance of conservation or other legitimate state concerns." *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 403 (1965).

Prior to the Kansas court's decision, courts and the Commission uniformly have held royalty obligations to be beyond the reach of the NGA. See, *e.g.*, *Mobil Oil Corp. v. FPC*, 463 F.2d 256 (D.C. Cir. 1971), *cert. de-*

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[6] At the time of the interim collections involved in this case, gas sellers were obligated, prior to collecting higher rates, to file a corporate undertaking securing payment of refunds. This requirement arose from the Commission's authority to require a bond under Section 4(e) of the NGA. This requirement was eliminated in 1983 by FERC Order No. 273, 48 Fed. Reg. 1279.

Phillips filed the required undertaking and agreed to comply with regulations promulgated under the NGA concerning refunding, reporting and record-keeping of interim rate collections. See App. 169a. This limited undertaking by Phillips was (1) to pay interest to gas purchasers, not royalty owners; and (2) to apply only to gas sales receipts held to be unjustified and refunded to purchasers. The corporate undertaking imposed no obligation on Phillips to pay interest to royalty owners at *any* rate. Despite this, the Kansas Supreme Court relied upon this undertaking. Its decision transformed Phillips' undertaking from a federally mandated promise to pay interest on refunds to pipeline purchasers into a federally mandated promise to pay interest to royalty owners on monies that never were refunded. No other court in the nation previously has recognized such third-party beneficiary rights. This is not surprising, for such a theory is contrary to the plain language of the regulation.

nied, 406 U.S. 976 (1972); *El Paso Natural Gas Co. v. Sun Oil Co.*, 708 F.2d 1011, 1016 (5th Cir. 1983), *cert. denied*, 468 U.S. 1219 (1984) ("lease transfers and the royalties collected thereunder are generally within the 'production or gathering' exception of the Act, 15 U.S.C.A. § 717(b), and thus not jurisdictional").[7] *See also* FERC Order No. 399, 49 Fed. Reg. 37735 (Sept. 20, 1984) ("the Commission does not have jurisdiction over royalty interest owners"); FERC Order *Camedan Oil Corp.*, No. GP85-47-000 (May 7, 1987), N.G.P.A. Info. Serv. (Fed. Program Advisory Serv.), ¶ 5,999-660 ("we hold that the transaction between the royalty owner and the producer is not a sale of natural gas and accordingly is not a first sale subject to the NGPA's Title I ceiling prices").

It is not surprising that the FERC requirement of interest previously has been viewed as having only a narrow application. See *United Gas Pipe Line Co. v. FERC*, 657 F.2d 790, 796 (5th Cir. 1981) ("interest can be required only when it is determined [by the Commission] that the money belongs to the consumers"). This Court's prior opinion noted these limits: "No federal statutes touched on the liability for suspended royalties . . . ." App. 63a.

Notwithstanding this substantial body of law, the Kansas court inexplicably extended the reach of the federal regulation, and thus the scope of the NGA, to govern an aspect of the relationship between royalty owners and gas producers or purchasers. Creation of this federal common law did not forward any federal interests. Congress excepted matters pertaining to royalties and other

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[7] The Kansas Supreme Court itself recognized this limitation of the scope of the NGA in *Lightcap v. Mobil Oil Corp.*, 221 Kan. 448, 562 P.2d 1, *cert. denied*, 434 U.S. 876 (1977) ("the FPC has no jurisdiction over a royalty owner or over a dispute between a royalty owner and his producer as to the amount of royalties payable under a gas lease").

issues inherent in the production of gas from federal regulation. Since Congress has concluded that regulating the relationship between royalty owners and producers or purchasers should be left to the states, questions concerning that relationship cannot "implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 642 (1981). The imposition of a new, purportedly uniform federal common law rule by the Kansas Supreme Court defeats the congressional intent that states regulate this relationship.

Creation of federal common law to govern private activities in fields regulated by federal agencies is not favored. Because Congress divided power between a regulatory body and the states, it should be concluded that Congress "was the exclusive source of *federal* law." *Milwaukee v. Illinois*, 451 U.S. 304, 319 n.14 (1981) (emphasis in opinion). The Kansas court cannot be permitted to add a layer of court-imposed national regulation, especially when there is no federal disposition to do so and the relevant federal regulatory agency lacks any power to create such regulation. See *Pennzoil Co. v. FERC*, 645 F.2d 360, 385 (5th Cir. 1981) (the NGA does not require a federal common law of contracts).

Particularly offensive is that the Kansas court used the federal regulation to defeat a contractual provision to avoid interest liability that Texas has recognized as valid. In *Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480, 484 (Tex. 1978), the Texas Supreme Court identified a contractual pricing provision that it indicated would result in no interest liability attaching. Thereafter, Phillips entered into contracts containing this type of "no interest" provision. It specified a purchase price for gas calculated first on the basis of approved filed rates. Then, when and if a new rate was approved, the contract provided for a recomputation of the purchase price for the period in which Phillips collected un-

approved rates and a payment of the recomputed price *without interest.*

The Kansas Supreme Court invalidated Phillips' "no interest" contract clauses, holding that such provisions were contrary to federal regulations. App. 16a. In reaching this conclusion the Kansas Supreme Court again misinterpreted federal law. In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), this Court noted that "the Commission itself lacks affirmative authority, absent extraordinary circumstances, to 'abrogate existing contractual arrangements,' " and that "nothing in the [Natural Gas] Act *forbids* parties from setting their rates by contract." (emphasis in opinion). *See also Pennzoil Co. v. FERC*, 645 F.2d 360, 384-85 (5th Cir. 1981) ("the NGA did not abrogate the ability of the parties to privately contract within the regulatory confines of the Act").[8] The Kansas court's treatment of these contract clauses exceeded even the Commission's power over them. In passing upon the validity of these contractual provisions under the NGA, the court below "usurped a function that Congress has assigned to a federal regulatory body." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 582. Consistent with federal statutes, Phillips had the right (1) to contract to pay additional royalties after appellate reviews of the new rates were final, and (2) to pay the additional royalties without interest. Creating federal common law to eliminate that right not only conflicted with what the Texas Supreme Court has held to be its law, but also served to frustrate federal interests and the statutory scheme created by Congress.[9]

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[8] Just as the federal legislation and regulation did not address the interpretation of gas purchase escalation provisions (the *Pennzoil* case), the NGA and Commission regulations do not address private contractual arrangements to pay additional royalties *without interest.*

[9] In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board of Mississippi*, 474 U.S. 409, 88 L.Ed.2d 732 (1986), this

The Kansas court created federal common law that is inconsistent with the NGA and the plain language of 18 C.F.R. § 154.102. In light of the unambiguous language of the regulation, the Commission itself could not achieve the result reached by the Kansas court. *FERC v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984).[10] The Kansas court's repeated reliance on vague notions of overriding "equitable considerations" that ultimately only reflect its own parochial interest cannot support its holding. As this Court noted in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584, "no appeal to equitable principles can justify this usurpation of federal authority."

The Kansas Supreme Court seems pathologically determined to maximize Phillips' liability despite various state laws that are not as Draconian or anti-gas producer or purchaser as Kansas law and contract pricing provisions that obviated any interest obligation. Its latest technique is simply to "FERC 'em." That court's repeated resort to the fabrication of federal law to solve its dilemma as to how to hold Phillips liable, notwithstanding this Court's mandate, poses a substantial misconstruction of federal law that only this Court can correct.[11]

Court invalidated a state regulation because that regulation was inconsistent with the perceived intent of Congress to allow market forces to set supply and price levels. 88 L.Ed.2d at 745-46. The Kansas Supreme Court's action in eliminating the ability of producers or purchasers to bargain for the right not to pay interest is equally inconsistent with this congressional intent. That court's action directly impacts the costs an interstate pipeline faces in selling gas in that market and "threaten[s] to distort the market once again" by "artificially increasing" costs faced by a producer. See 88 L.Ed.2d at 746.

[10] If the Commission wished to change the regulation to attempt to impose the liability Kansas imposed, it would have to repromulgate the regulation pursuant to the Administrative Procedure Act, 5 U.S.C. § 553. The Kansas Supreme Court's exercise of judicial fiat circumvents the protections that would be afforded Phillips and other interested parties in such a proceeding.

[11] The creation of federal common law by the court below violates the Commerce Clause. This Court has recognized that "[t]he

III. The Court Below Violated Principles Of Due Process And Full Faith And Credit By Failing To Give Effect To The Controlling Law Of Other States.

In its prior decision, this Court allowed Kansas to entertain a nationwide class action and adjudicate in one action the claims of over 28,000 individuals who were residents of all 50 states, the District of Columbia and several foreign countries. Recognizing the unique nature of the modern nationwide class action, this Court established certain *minimums* of procedural due process that must be accorded plaintiff class members. This Court went further, however, and recognized the limitations our federal system imposes on the states by overturning the Kansas Supreme Court's application of Kansas law to each of the transactions involved in this case. This Court held that constitutional limitations on choice of law "must

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very purpose of the Commerce Clause was to create an area of free trade among the several states." *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330-31 (1944). Because of this purpose, "the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

Kansas seems determined to assume the role of this nation's Natural Gas Royalty Czar. By doing so, the Kansas court has usurped Congress' power under the Commerce Clause and the freedom of other states in the Union to act when Congress has failed to do so. Through its use of the national class action device, and its creation of uniform interest liability rules—not surprisingly identical to its own—in effect Kansas exported and applied Kansas law to contractual transactions having no relation to Kansas whatsoever. In doing so, it has regulated interstate commerce in a wholly impermissible fashion and has deprived the other states of any opportunity to formulate their own policy for transactions in which they have far more substantial interest. Only Congress has the constitutional authority to regulate interstate commerce in the way and to the extent that Kansas has in this case. Because those actions of the Kansas Supreme Court violate the Commerce Clause, certiorari should be granted so that this Court can correct the situation.

be respected even in a nationwide class action." App. 86a.[12]

The actions of the Kansas court on remand upset the constitutional balances struck by this Court in its prior opinion. The interests of federalism, as impacted by a nationwide class action, require a strict adherence to those principles of Full Faith and Credit upheld in this Court's prior reversal of the Kansas court. Indeed, because of the dimension of the nationwide class action and its potential for impacting the rights of thousands and even millions of people in every other state, the significance of full faith and credit and the need to assure the proper application of the law of interested states is far greater than it is in the usual two-party actions that historically have brought governing law issues to this Court.

It was the patently unfair advantage that a class plaintiff may derive from commencing a nationwide action in a parochial forum that this Court's prior decision sought to check through choice-of-laws restrictions. What was done below on remand threatens to undermine this critical restraint. Only this Court can ensure that the nationwide class action device does not become one state's tool for imposing its favored local policies on the nation. The effectuation of the principles established by this Court's prior opinion in this case can only be accomplished by this Court in order to assure that Full Faith and Credit is given other states' laws.

In its decision, the court below failed to follow this Court's holding. Rather than examining the laws of the other states in a critical and searching fashion, the Kansas Supreme Court looked into a mirror and saw its "equitable" notions reflected in the laws of the other states. Having done so, that court blithely proceeded to

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[12] Phillips believes that choice of law is one of the safeguards announced by this Court for nationwide class actions. It is all part of the delicate balance of competing rights and power that due process requires be kept in equilibrium.

rewrite those laws to produce the desired "Kansas answer." As was noted above, when faced with conflicting rules of law that could not easily be rewritten, the federal regulation, 18 C.F.R. § 154.102, became the Kansas court's universal solvent for removing all impediments to both the imposition of liability for interest and the imposition of the higher federal rates.[13] By failing to construe candidly the laws of the other states, the court below did not honor its obligations under the Full Faith and Credit Clause.[14]

For example, the Kansas court rejected Louisiana precedent holding that additional royalties based upon Commission interim approvals are unliquidated and not ascertainable until final approval and thus do not give rise to interest liability. *Whitehall v. Boagni*, 255 La. 67, 229 So.2d 702 (1969). The Kansas court determined that interest on Louisiana royalties accrued prior to Commission approval, thereby eviscerating the effect of Louisiana's controlling precedent.

The court's lack of good faith also can be seen by the bald fabrication of an "industry practice" to defeat the effect of a controlling Oklahoma statute, Okla. Stat. tit. 23, § 8. App. 28a. That statute extinguishes liability for interest if the principal is paid and accepted. Al-

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[13] One is reminded of the following exchange between Alice and Humpty Dumpty:

> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

Lewis Carroll, *Through The Looking Glass; And What Alice Found There* (1872; reprint, New York: Avenel Books, n.d.), 124.

[14] The fact that the Kansas Supreme Court may have been "well intentioned" in what it did is not grounds for condoning what was, in reality, a bad faith review of state law. "She means well, but can't help saying foolish things, as a general rule." Carroll, op. cit., 196.

though the Oklahoma courts never have recognized an "industry practice" exception to this statute, and although the issue of the existence of such an "industry practice" was not raised by the royalty owners as a way to defeat that Oklahoma statute, the Kansas Supreme Court created this exception and purported to find facts to justify its application. If Phillips had any notice of that court's intent, it would have taken measures to demonstrate that no "industry practice" existed. Fabricating this exception to the Oklahoma statute and then applying it without affording Phillips any opportunity to address either the factual or legal basis of this determination, shows that the Kansas Supreme Court had no interest in carrying out this Court's mandate.

The lack of the Kansas Supreme Court's good faith in applying the laws of other states also is demonstrated in its seizing an issue that was not appealed and increasing post-judgment interest rates. Kansas post-judgment interest rates were imposed in the original judgment of the Seward County District Court and were not overturned on appeal or by this Court.[15] The district court on remand again correctly applied the Kansas post-judgment interest rate statute. The Kansas Supreme Court, *sua sponte*, reversed "the ruling insofar as it applied the Kansas post-judgment interest rate to the states of Texas, Oklahoma, Louisiana, New Mexico and Wyoming." App. 51a. In its motion for rehearing, Phillips emphasized that

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[15] Justice Stevens, in his concurring and dissenting opinion, noted that:

> The court also held that interest accruing after the entry of judgment should be determined by Kansas' post-judgment interest statute. Kan. Stat. Ann. § 16-204 (1974). Phillips does not and could not contend that the Constitution bars a Kansas court from applying the Kansas post-judgment interest statute to judgments entered by Kansas courts. Such statute demonstrate an irrefutable state interest in the force carried by judgments entered by a state's own courts.

App. 94a, n.11.

no question had been presented concerning the application of other states' post-judgment interest rates.[16] The Kansas Supreme Court denied rehearing and persisted in applying other states' higher post-judgment rates.[17] This *sua sponte* application of other states' post-judgment interest rates exceeded the jurisdiction of the Kansas court and violated the boundaries of proper judicial conduct.[18]

Unless this Court enforces careful adherence to the constitutional principles of choice of law in nationwide class actions, serious invasions of state judicial sovereignty are likely to occur through the use of this procedural device. "Both the Due Process and Full Faith and Credit Clauses ensure that the states do not 'reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1981) (Powell, J., dissenting), *quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). If a state court in a nationwide class action can export its own notions of public policy by restructuring other states' laws to match its own, as Kansas has in this case,[19] these constitutional

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[16] Plaintiffs also responded to this motion and indicated that they had no objection to the application of Kansas post-judgment interest rates.

[17] Although denying rehearing, the Kansas Supreme Court excepted "the clarification of post-judgment interest rates" and modified the rate it had ascribed to Texas. App. 53a.

[18] See *Matter of Bybee*, 236 Kan. 443, 691 P.2d 37 (1984) (questions not presented to lower court cannot be decided on appeal) and *Haas v. Freeman*, 236 Kan. 677, 693 P.2d 1199 (1985) (without cross-appeal, court lacks jurisdiction to consider issues).

[19] Kansas' parochial bias for forum state policy can be seen in the district court's decision on remand, which termed it "inconceivable" that Phillips could seek the application of other states' statutory interest rates "which were established for the most part, prior to the 1940's, and at what best could be described as post-depression rates." App. 58a. The district court also declared that "I find no basis to conclude that any state court would be any less logical or fair than the Kansas Supreme Court has been in the *Shutts* case." App. 59a.

policies are defeated and a critical cornerstone of federalism is displaced.

If this Court leaves unchecked the excesses of the Kansas court, forum shopping will result. There is some evidence that it already has. Kansas' willingness to favor royalty owners may have spawned at least seven other reported Kansas nationwide class actions similar to the present one. No other state has a single reported decision involving a class action seeking interest on additional royalties. Kansas' attitude has led it to become a magnet attracting class actions on behalf of royalty owners.[20]

The jurisdictional freedom this Court extended to state courts to entertain nationwide class actions in the earlier phase of this case obliges this Court to be vigilant to make sure that the procedural device is not abused to the detriment of other states and litigants with legitimate expectations as to the law governing their activities. It is not

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[20] The seven similar Kansas class actions are: *Nix v. Northern Natural Gas Producing Co.*, 222 Kan. 739, 567 P.2d 1322 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Sterling v. Superior Oil Co.*, 222 Kan. 737, 567 P.2d 1325 (1977), *cert. denied*, 434 U.S. 1067 (1978); *Maddox v. Gulf Oil Corporation*, 222 Kan. 733, 567 P.2d 1326 (1977), *cert. denied*, 434 U.S. 1065 (1978); *Shutts, Executor v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); *Wortman v. Sun Oil Co.*, 236 Kan. 266, 690 P.2d 385 (1984), *vacated*, —— U.S. ——, 88 L.Ed.2d 33 (1985); *Helmley v. Ashland Oil, Inc.*, 1 Kan. App.2d 532, 571 P.2d 345 (1977); *Gray v. Amoco Production Co.*, 1 Kan. App.2d 388, 564 P.2d 579 (1977), *modified*, 223 Kan. 441 (1978). Kansas has entertained nationwide class actions seeking to recover "market value" royalties for royalty owners. See *Matzen v. Cities Service Oil Co.*, 233 Kan. 846, 667 P.2d 337 (1983) (involving 16 consolidated class action natural gas royalty cases). It has a reported decision involving a nationwide class of royalty owners seeking to recover for helium extracted but not paid for. *Gigot v. Cities Service Oil Co.*, 241 Kan. 304 (1987). No other state has reported class actions of these types. Texas even has restricted the use of the class action device in "market value" cases. *Amoco Production Co. v. Hardy*, 628 S.W.2d 813 (1981).

sufficient if 49 states faithfully apply the law of other states. If the remaining state acts to advance its own policies in nationwide class actions under the guise of a "construction" of other states' law, it will become the Mecca for entertaining nationwide class actions and the threat to state sovereignty becomes a reality.[21] The constitutional protection created by the Full Faith and Credit and Due Process Clauses and enjoyed by a class action defendant—a right recognized by this Court in *Shutts*—also will be extinguished. This Court should issue a writ to the Kansas court to enforce those restrictions on nationwide class actions and choice-of-law announced in its prior opinion in this case.

IV. The Kansas Court's Utilization Of A Federal Regulation In A Manner Patently Unintended By Congress Or The Regulatory Agency That Promulgated It, Producing An Adverse Impact On Interstate Natural Gas Pricing, Violated The Supremacy Clause.

State action is invalid under the Supremacy Clause if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).[22] This Court has exhibited particular concern with regard to state actions that "could seriously impair the [Commission's] authority to regulate the intricate relationship between the [gas] purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states." *Northern Natural Gas Co. v. State Cor-*

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[21] This concern has been raised by commentators on this Court's opinion. See J.E. Kennedy, *The Supreme Court Meets The Bride Of Frankenstein: Phillips Petroleum Co. v. Shutts And The State Multistate Class Action*, 34 Kan. L. Rev. 255, 305 n.232 (1985).

[22] See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982).

poration Commission, 372 U.S. 84, 92 (1963).[23] This Court's sensitivity to this area stems from its recognition that the "federal regulatory scheme leaves no room either for direct state regulation of the prices of interstate wholesales of natural gas . . . or for state regulations which would indirectly achieve the same result." *Northern Natural Gas Co.*, 372 U.S. at 91.

As an integral part of its natural gas regulatory scheme, Congress and the Commission determined that producers who must refund price increases found to be unjustified should pay purchasers interest with those refunds. This determination, as one aspect of a comprehensive scheme, obviously impacts on the interstate pricing of natural gas. Kansas' imposing of this regulation and its interest requirements—in effect, on a nationwide scale—to royalty payments computed on the basis of pending gas price increases and forbidding efforts to avoid this interest liability contractually—actions not intended by Congress or by the Commission—impermissibly impacts interstate gas pricing and cannot withstand constitutional scrutiny. Because the decision of the Kansas Supreme Court violates the Supremacy Clause, certiorari should be granted.

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[23] See, *e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 746-52 (1981).

CONCLUSION

This Court should issue a writ of mandamus directing the Kansas Supreme Court to comply with its prior mandate, or should issue a writ of certiorari to consider the federal and constitutional questions arising from the Kansas Supreme Court's decision.

Respectfully submitted,

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